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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DASEAN COOPER,

Defendant and Appellant.

B303284

(Los Angeles County
Super. Ct. No. YA016132)

Appeal from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of appeal, for defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Idan Ivri and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant DaSean Cooper appeals from the summary denial of his petition for resentencing under Penal Code section 1170.95.¹ In a prior appeal, we affirmed appellant’s conviction of first-degree murder with a finding that he personally used a firearm. In ruling on the section 1170.95 petition, the trial court relied the record of conviction to conclude that appellant was ineligible for resentencing under section 1170.95 as a matter of law, because he was convicted as an actual killer under a theory of premeditated murder.

In this appeal, appellant contends the trial court erred in summarily denying his petition without appointing counsel because (1) his petition stated a prima facie case for relief, and a section 1170.95 proceeding is a “special proceeding” in which the trial court has no inherent discretion to deny relief if a petition states such a case; (2) it was improper for the trial court to rely on the record of conviction in its determination to deny his petition; and (3) his federal and state constitutional rights were violated. We are not persuaded. Because the record of conviction shows that appellant is ineligible for relief under section 1170.95 as a matter of law, we affirm the judgment.

BACKGROUND

The summary of the factual background is based on our earlier opinion affirming appellant’s conviction, *People v. Cooper* [nonpub. opn., filed Oct. 23, 1996], case No. B092651].

¹ All further section references are to the Penal Code.

I. *The Murder*

The murder victim, Scott Charles (Pearl) was shot and killed on June 20, 1993. Pearl lived with Kristi Laurent at Kristi's house on Thoreau Street in Los Angeles with Kristi's son, her brother Craig, and Dion Cormia. At that time, appellant had been dating Kristi for about a year, and was acquainted with Pearl.

Around midnight on the night of June 19, 1993, appellant had an argument with Kristi about rumors regarding his infidelity. Appellant confronted Pearl and three of Pearl's friends in the driveway. Appellant punched one of Pearl's friends in the face, and a fight ensued, shortly after which Pearl and his friends ran inside the house. Appellant left the scene stating he would come back "strapped."

Appellant returned to the scene about four minutes later. Pearl was a passenger in a car belonging to witness Raymond Hayward, who was attempting to back out of the driveway. Appellant used his car to block Hayward's car. Then he and two of his friends approached Hayward's car. Appellant pulled a semi-automatic handgun out of his waistband and pointed it at Pearl. Shortly afterward, he began shooting at Pearl and the other passengers in Hayward's car.

Pearl was struck in the back with a bullet as he attempted to run away. Hayward attempted to pick him up, but appellant kept shooting and Hayward left the scene. Appellant and his friends approached Pearl, and Pearl pleaded, "Don't do it." Appellant's friends began to leave, and appellant said, "No. Fuck that. Unload on him." He then shot Pearl four more times.

II. *The Conviction and Appeal*

Appellant was convicted of first-degree murder under section 187, and the jury made a true finding under section 12022.5, subdivision (a) that appellant personally used a firearm. He was sentenced to 29 years to life. On appeal of his conviction, appellant challenged, among other things, the sufficiency of the evidence to prove that he acted with premeditation and deliberation, and he argued that the use of a weapon is not always evidence of a plan to kill.

This Court affirmed the judgment, concluding that the facts “clearly” supported a premeditated intent to kill. This Court also found that the use of a weapon could support such an intent in light of the “manner of killing.”

III. *The Section 1170.95 Petition and Proceedings*

On September 18, 2019, appellant filed in the trial court a petition for a writ of habeas corpus. The trial court chose to treat it as a petition for relief under section 1170.95. The petition stated that appellant was entitled to resentencing under section 1170.95 because he was convicted of first-degree murder, the prosecution argued the natural and probable consequences doctrine at trial, and he was not the actual killer. Appellant requested appointment of counsel pursuant to section 1170.95, subdivision (c), on the basis that he was indigent and the legal issues were of a complicated nature such that he could not represent himself.

On November 13, 2019, the People filed a written response to appellant’s petition, arguing that appellant was not eligible for

resentencing under section 1170.95 because he was convicted as an actual killer under a theory of premeditated murder. The response also challenged the constitutionality of section 1170.95.

The trial court issued an Order of Dismissal on November 14, 2019, following an in-chambers proceeding at which neither appellant nor the prosecution was present. The Order stated that a review of the court file revealed that appellant was not entitled to relief under section 1170.95 as a matter of law, as he was convicted as an actual killer. It also noted that the jury made a finding under section 12022.5, subdivision (a) that appellant intentionally and personally discharged a firearm causing the victim's death. The trial court did not rule on the prosecutor's constitutional question.

Appellant filed a timely notice of appeal on December 13, 2019.

DISCUSSION

Appellant contends that the trial court erred under section 1170.95, and violated his federal and state constitutional right to counsel, by summarily dismissing his petition for resentencing without appointing counsel and by relying on the record of conviction. We disagree.

I. Petitions Under Section 1170.95

By amending sections 188 (defining malice) and 189 (defining the degrees of murder), Senate Bill No. 1437 (S.B. 1437), effective January 1, 2019, changed “the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder

liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).)²

In addition, S.B. 1437 added section 1170.95 (Stats. 2018, ch. 1015, § 4), which allows a person convicted of felony murder, or murder under the natural and probable consequences doctrine, to “file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial [¶] (3) The petitioner could not be convicted of

² In amending section 188, S.B. 1437 added the following provision: “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 2.) S.B. 1437 also added the following as subdivision (e) of section 189: “A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.” (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.)

first or second degree murder because of changes to Section 188 or 189.”
(§ 1170.95, subd. (a).)

Subdivision (b)(1) of section 1170.95 requires that the petition be filed with the court that sentenced the petitioner, and must include (a) a declaration by the petitioner that he or she is eligible for relief under the section; (b) the superior court case number and year of conviction; and (c) whether the petitioner requests appointment of counsel.

Subdivision (b)(2) provides that the trial court may deny the petition without prejudice if any of the information required by subdivision (b)(1) is missing and cannot be readily ascertained by the court.
(§ 1170.95, subd. (b)(2).)

Subdivision (c)—the provision at issue in this appeal—provides: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.”
(§ 1170.95, subd. (c).)

The remainder of the statute sets forth the procedure for responding to, and the hearing on, the order to show cause, as well as post-hearing matters.

II. *Summary Denial*

Appellant contends that the trial court erred by summarily denying his section 1170.95 petition without appointing counsel. He asserts that a petition states a prima facie case if the allegations therein would support a ruling in the petitioner's favor, that his petition made such a case, and that because a petition for resentencing under section 1170.95 is a "special proceeding," the trial court possessed no inherent discretion to deny relief. Rather, he argues, the trial court is statutorily required to appoint counsel and hold a resentencing hearing.

We disagree, as have several courts of appeal considering the identical contentions. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137–1140 (*Lewis*), rev. granted, S260598, March 18, 2020; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 (*Cornelius*), rev. granted, S260410, March 18, 2020; *People v. Verdugo* (2020) 44 Cal.App.5th 320 (*Verdugo*), rev. granted, S260493, March 18, 2020.) Although the issues are now pending before the California Supreme Court, we find the analysis of these cases persuasive.

As the court in *Lewis* observed, section 1170.95, subdivision (c) describes a chronological sequence of actions. This sequence includes two stages in which the court reviews a "prima facie showing," one taking place before briefing and one after. *Lewis* determined that the requirement to appoint counsel arises at a specific point in the sequence, namely, "after the court determines that the petitioner has made a prima facie showing that petitioner 'falls within the provisions' of the statute, and before the submission of written briefs and the

court's determination whether petitioner has made 'a prima facie showing that he or she is entitled to relief.'" (*Lewis, supra*, 43 Cal.App.5th at p. 1140.)

In *Verdugo*, the court explained that section 1170.95, subdivision (b)(2) describes another stage of proceedings which takes place before the sequence described in subdivision (c). At this stage, the court "may deny a petition without prejudice if any of the information required by subdivision (b)(1) is missing from the petition and cannot be readily ascertained by the court. This initial review thus determines the facial sufficiency of the petition." (*Verdugo, supra*, 44 Cal.App.5th at pp. 327–328.) Because of this, review of subdivision (c)'s prebriefing prima facie showing is not a determination of facial sufficiency, as it would then be redundant with the stage described in subdivision (b)(2), and courts have a duty to interpret section 1170.95 "to give meaning to all parts of the statute to the extent possible." (*Id.* at p. 329.)

For the same reason, the *Verdugo* court found that "the prebriefing determination whether the petitioner has made a prima facie showing he or she 'falls within the provisions of this section' must also be different from the postbriefing prima facie showing that the petitioner 'is entitled to relief,'" and therefore, that "[t]he midpoint between section 1170.95, subdivision (b)(2)'s initial finding the petition is facially sufficient and subdivision (c)'s second prima facie showing the petitioner is entitled to relief is a preliminary review of statutory eligibility for resentencing, a concept that is a well-established part of the resentencing process under Propositions 36 and 47. [Citations.] The court's role at this stage is simply to decide whether the petitioner

is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner.” (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.)

Subdivision (c) does not define the process by which the court is to do this. However, the *Verdugo* court found that “subdivision (b)(2) directs the court in considering the facial sufficiency of the petition to access readily ascertainable information. The same material that may be evaluated under subdivision (b)(2)—that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable—should similarly be available to the court in connection with the first *prima facie* determination required by subdivision (c).” (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.) If the record of conviction contains information showing that the petitioner is ineligible for relief under section 1170.95 as a matter of law, the trial court may rely on such information to dismiss the petition.

Following the analyses in *Lewis* and *Verdugo*, we conclude that under section 1170.95, the trial court had the authority to determine that appellant was not eligible for relief as a matter of law without appointing counsel. The trial court found upon reviewing the record that appellant was convicted as an actual killer, and that the jury found that appellant personally used a firearm. The record also shows that this Court, on appeal from appellant’s conviction, found that the evidence “clearly support[ed] a premeditated intent to kill.” As appellant was not convicted under the felony murder rule or on a theory of natural and probable consequences, he was not eligible for resentencing under section 1170.95 as a matter of law. Therefore, the trial court properly denied the petition without appointing counsel.

Appellant contends that the court erred in relying on appellant's record of conviction in determining that summary denial was proper. He argues that because section 1170.95 only refers to the "record of conviction" in subdivision (d)(3), reliance on the record of conviction by the trial court at any earlier stage in a section 1170.95 proceeding is improper. Also, he asserts that allowing the trial court to scrutinize the record of conviction at an earlier stage would require section 1170.95 petitioners to plead facts explaining why they can no longer be convicted of murder, and argues that this would be improper because section 1170.95 does not put petitioners on notice of this requirement. We are not persuaded.

As discussed, the *Verdugo* court explained that at the first stage of proceedings described in section 1170.95 subdivision (c), the trial court may rely on information readily ascertainable in the record of conviction. Moreover, prior to the evidentiary hearing described in section 1170.95 subdivision (d), the trial court cannot rely on facts other than those readily ascertainable from the record. (*People v. Drayton* (2020) 47 Cal.App.5th 965, 980 (*Drayton*).) The *Drayton* court concluded that in a section 1170.95 proceeding, "when assessing the prima facie showing, the trial court should assume all facts stated in the section 1170.95 petition are true. [Citation.] The trial court should not evaluate the credibility of the petition's assertions, but it need not credit factual assertions that are untrue as a matter of law—for example, a petitioner's assertion that a particular conviction is eligible for relief where the crime is not listed in subdivision (a) of section 1170.95 as eligible for resentencing. Just as in habeas corpus, if the

record ‘contain[s] facts refuting the allegations made in the petition . . . the court is justified in making a credibility determination adverse to the petitioner.’ [Citation.] However, this authority to make determinations without conducting an evidentiary hearing pursuant to section 1170.95, subd[ivision] (d) is limited to readily ascertainable facts from the record (such as the crime of conviction), rather than factfinding involving the weighing of evidence or the exercise of discretion (such as determining whether the petitioner showed reckless indifference to human life in the commission of the crime).” (*Ibid.*)

We agree with the analysis in *Drayton* that, at stages of section 1170.95 proceedings prior to the evidentiary hearing described in subdivision (d), the information the trial court may rely upon is limited to that which is readily ascertainable from the record. Also, where the record contains facts which contradict the allegations in the petition, as a matter of law, the court has the authority to disregard the allegations and deny relief.

Appellant argues that he had a federal and state constitutional right to counsel, because a proceeding under section 1170.95, subdivision (c) is a “critical stage” of his criminal prosecution. Because this issue was raised for the first time in appellant’s reply brief, it is forfeited on appeal. (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 [“The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for failure to present them before”]) In any event, it is meritless.

Appellant asserts that a right to counsel exists “at all critical stages of a criminal prosecution, including sentencing.” (*People v.*

Doolin (2009) 45 Cal.4th 390, 453.) However, what is at issue in this case is appellant's resentencing, not his sentencing as a stage of a criminal prosecution. The California Supreme Court has explained that when a defendant who petitions for resentencing is found ineligible, the decision "does not increase the petitioner's sentence; it simply leaves the original sentence intact." (*People v. Perez* (2018) 4 Cal.5th 1055, 1064.) Statutory provisions which entitle defendants to petition for resentencing, but do not increase their original sentence, do not constitute sentencing hearings so as to create a constitutional entitlement to counsel.

Furthermore, section 1170.95, subdivision (c) does not create a "critical stage" of proceedings. A "critical stage" is one where "potential substantial prejudice to defendant's rights inheres in the [particular] confrontation and the ability of counsel to help avoid that prejudice.' . . . "The essence of a 'critical stage' is . . . the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel.'" (*People v. Rouse* (2016) 245 Cal.App.4th 292, 297.) Although the trial court in this case did not dismiss appellant's petition until after the People had submitted a brief in response, we do not find that the absence of counsel at the stage of dismissal was prejudicial to appellant. As discussed, a trial court in a section 1170.95 proceeding is limited as to what information it may use to make a determination prior to the evidentiary hearing described in subdivision (d). (*Drayton, supra*, 47 Cal.App.5th at p. 980.) As the trial court found appellant ineligible for relief under section 1170.95 as a matter of law based solely on the information it

was entitled to rely on, neither the absence of counsel for appellant nor receiving the People's brief affected the trial court's determination. In short, the proceeding was not a critical stage.³

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.

³ Because we resolve the case on this basis, we need not consider the parties' contentions whether the harmless error doctrine applies to the supposed error in not appointing counsel.